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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-0325-20

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS AT AUSTIN

FILED
COURT OF CRIMINAL APPEALS
10/27/2020
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS

APPELLANT

V.

DUKE EDWARD

APPELLEE

FROM THE 14TH COURT OF APPEALS AT HOUSTON

CAUSE NO. 14-18-00302-CR

APPELLE'S BRIEF

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ORAL ARGUMENT NOT GRANTED

IDENTITY OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

IDENTITY OF PARTIES AND COUNSEL

The parties to the Trial Court's judgment are the State of Texas and Duke Edward.

The case was tried before the Honorable Patricia Grady of the 212th Judicial District Court of Galveston, Texas.

Counsel for Appellee at trial was Calvin Parks, 1120 Broadway, Suite 2743, Pearland, Texas 77584.

Counsel for Appellant at trial were Patrick Gurski and Colton Turner, Assistant Criminal District Attorneys, 600 59th Street, Suite 1001, Galveston, Texas 77551.

Counsel for Appellee on appeal was James DuCote, 3027 Marina Bay Drive, Suite 226, League City, Texas 77573

Counsel for Appellant on appeal was Renee Magee, Assistant Criminal District Attorney, 600 59th Street, Suite 1001, Galveston, Texas 77551.

Counsel for Appellant before this Court is Renee Magee, Assistant Criminal District Attorney, 600 59th Street, Suite 1001, Galveston, Texas

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STATEMENT OF THE CASE

Duke Edward, Appellee, was charged under Section 22.01(a) and (b) of the Texas Penal Code with the crime of knowingly or recklessly causing bodily injury to a family member as defined by Section 71.0021(a) and (b) of the Texas Family Code. Appellee was convicted of the offense on conclusion of a jury trial in the 212th Judicial District Court of Galveston County, Texas. Appellee plead true to Enhancement Paragraph 1 and Enhancement Paragraph 2, and was sentenced by the jury for the commission of the offense, as enhanced, to the Texas Department of Criminal Justice for a period of 60 years.

On appeal, Appellee raised the single issue of the evidence of a "dating relationship" under the Texas Family Code sec. 71.002(b). In an unpublished opinion the plurality of a three judge panel, with one judge dissenting, of the Fourteenth Court of Appeals agreed with Appellee, and reversed Appellee's conviction and remanded to the trial court with instructions to reform the judgment to be a Class A misdemeanor conviction, and to conduct a new punishment hearing.

In *Edwards* [1], This Court granted the State's Petition for Discretionary Review on September 16, 2020. Appellee now files this brief in response to the State's brief which urges reversal of the decision of the Court of Appeals.

ISSUE PRESENTED

Was the 14th Court of Appeals correct in determining that there was insufficient evidence presented at trial to justify finding Appellee of guilty of the offense of knowingly or recklessly causing bodily injury to a family member as defined by Section 71.0021(a) and (b) of the Texas Family Code?

[1] *Edward v. State*, No. 14-18-00302-CR 1480221 (Tex. App. – Houston {14th Dist.} March 26, 2020

STATEMENT OF THE FACTS

Appellee was charged under Section 22.01(a) and (b) of the Texas Penal Code with the crime of knowingly or recklessly causing bodily injury to a family member as defined by Section 71.0021(a) and (b) of the Texas Family Code. Appellee entered a plea of not guilty. [2]

On July 9, 2017, Officer Richard Hernandez of the LaMarque, Texas Police Department responded to a 911 call that the caller, later determined to be Maggie Bolden, had been beaten, and that her assailant was "still here". [3] Ms. Bolden, in response to Officer Hernandez' questioning, told Officer Hernandez that her "boyfriend", Appellee, had beaten her. [4] Officer Hernandez found Appellee to still be in Ms. Bolden's apartment, sitting on her bed. Officer Hernandez testified that Ms. Bolden did not identify Appellee as her "boyfriend" on either his body camera video or the 911 recording. The emergency medical technician, Amanda Black, testified that Ms. Bolden told her that her "boyfriend beat her up". Ms. Black testified that she had no firsthand information concerning the relationship between Ms. Bolden and Appellee.

[2] RR III, at 7
[3] RR III, at14
[4] RR III, at 15

The State proffered Exhibits 1 through 7, all of which, except for portions from Exhibit 7, the affidavit , were agreed upon. Appellee objected to a the narrative in Exhibit 7 of the EMS worker who was at the scene, requesting to take the EMS worker on voir dire "to make sure that the first hand information was gathered by her and not the officer". [5] The Court deferred ruling on Appellee's objection "to consider that at a later time" [6], and admitted State's Exhibits 1 through 6. Neither Appellee nor complainant testified at the trial.

At the conclusion of evidence, Appellee was convicted by the jury of the charged offense in the 212th Judicial District Court of Galveston County, Texas. [7] Appellee plead true to Enhancement Paragraph 1 and to Enhancement Paragraph 2; and after trial, was sentenced by the jury for the commission of the offense, as enhanced, to the Texas Department of Criminal Justice for a period of 60 years. [8]

[5] RR III, at 5
[6] RR III, at 6
[7] RR III, at 72
[8] RR III, at 47

ARGUMENT

The 212th Judicial District Court should have granted Appellee's Motion for Directed Verdict, and should have acquitted Appellee, and the jury should not have been permitted an opportunity to convict Appellee, because the State failed to present sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Appellee was criminally responsible for committing each and every element of the crime alleged in the indictment, specifically, that Appellee and complainant had a dating relationship.

Appellee was charged under Section 22.01(a) and (b) of the Texas Penal Code with the crime of knowingly or recklessly causing bodily injury to a family member as defined by Section 71.0021(a) and (b) of the Texas Family Code.

At the end of the guilt innocence phase Appellee's counsel made a motion for a directed verdict of finding Appellee not guilty on the basis that the State "failed to meet its burden in the case as charged in the indictment" stating that "Mr. Duke was charged with assault family violence to a family member or someone in a dating relationship." Appellee's counsel contended that the evidence had not risen to a level

to prove a dating relationship existed between Appellee and complainant, Maggie Bolden. Appellee further contended that since the complainant hadn't appeared, there was no way to have proven whether the complainant had suffered pain or of the character of the injuries alleged to have been sustained by complainant. [9]

Under Section 22.01 (a) of the Texas Penal Code, a person commits an offense "if the person intentionally, knowingly or recklessly causes bodily injury to another, including the person's spouse". An offense under subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against "a person whose relationship is described by Section 71.0021(a) of the Family Code. Section 71.0021(a) defines "dating violence" as "an act, other than a defensive measure to protect oneself, by an actor that is committed against a victim or applicant for a protective order with whom the actor has or has had a dating relationship;" Section 71.0021(b) defines a "dating relationship" as a "relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature." Section 71.0021(b) goes on to say "The existence of such a relationship shall (emphasis added) be determined

[9] RR III, at 48-49

based on consideration of: (1) the length of the relationship; (2) the nature of the relationship; and (3) the frequency and type of interaction between the persons involved in the relationship"[10], mandating that all three factors shall be considered.

Apart from evidence of the presence of Appellee in Ms. Bolden's apartment, and usage of the term "boyfriend" there was no evidence admitted at the trial which would have allowed a reasonable trier of facts to do anything more than conjecture about a dating relationship between Appellee and Ms. Bolden. There was no evidence proffered or testimony given as to any of the three factors that Section 71.0021(b)(1), (2) or (3) required be considered to determine if there was a dating relationship between Appellee and the complainant; and, moreover, there was no evidence that the jury had "suo sponte" considered any of these factors. Absent either direct evidence of the factors required by Section 71.0021(b)(1),(2), or (3), or that the jury, on its own instigation had considered these factors, there could be no finding that there was a "dating relationship" between Appellee and complainant, and the Court should have granted Appellee's motion for a directed verdict.

[10] Texas Family Code, Section 71.0021(b)

In reference to Section 71.0021(b)(1),(2), or (3), there was no evidence presented of the length of any relationship which may have existed between Appellee and complainant, such as evidence of long-term occupancy of complainant's apartment by Appellee, Appellee's clothing in the apartment, Appellee's name on the lease of the apartment, mail addressed to Appellee at the apartment, or witnesses testifying that they had seen Appellee and complainant together over a period of time. In short, there was no evidence presented of any of the myriad of possible indicators of a dating relationship between Appellee and Ms. Bolden. There were only hearsay statements calling Appellee "boyfriend". [11] Were it not for the specific requirements of Section 71.0021(b), (1), (2), (3) the unadorned term "boyfriend" might have been sufficient to allow a trier of facts to imply that Appellee and Ms. Bolden had a "dating relationship", but the inclusion in the section of these specific requirements by the framers mandates that the trier of facts consider them all based on specific evidence presented. In Appellee's case, if any relationship did exist, it was a "casual acquaintanceship or ordinary fraternization in a business or social

[11] RR III, at 14 and 20

context". No evidence was presented that satisfied the requirements of Section 71.0021(b), (1), (2), and/or (3) for the consideration by the trier of facts.

Three cases illustrate the type of direct evidence required by Section 71.0021(b) to establish such a relationship.

In *Oyervidez* , a case with facts similar to Appellee's case, the defendant had allegedly hit the complainant, had tied her up, and had left her. Because the complainant did not testify at trial, the State had relied upon a recording of complainant's 911 call as its principal evidence. In the 911 call admitted by the court, the complainant had identified the defendant as her boyfriend, stated that they had been living together "for almost a year", and that she had been "with him four years already". Despite some confusion that the complainant was the person making the 911 call, the 911 operator was told that the caller's "live in boyfriend" had been the person who assaulted her. [12]

Based on the possibility of the resolution of the identity of the

[12] *Oyervidez v. The State of Texas,* No. 01-07-00007-CR , First District Court of Appeals, 2107

complainant and also the identity of her assaulter, and the evidence in the 911 call that some of the requirements of Section 71.0021(b), (1), (2), and/or (3) had been met, the court sustained defendant's conviction. [13] No such elaboration of Mr. Edward's relationship with the complainant was offered or admitted in his case.

Ochoa v. State, 355 S.W. 3 48 (Tex. App.-Houston [1 Dist.] 2010) [14], a case involving whether a "dating relationship" could exist between members of the same sex, particularized evidence was presented complying with each of the three requirements of Section 71.0021(b), (1), (2), and (3) by the following "!n 2007, William Crump and Appellant met at a local bar, which they frequented. There, they would occasionally socialize, play pool, drink and talk. After approximately three years of platonic friendship, Crump and Appellant began having sexual relations. At the time, Crump had two other roommates who resided together in one of the two bedrooms in Crump's house.

For nine days, appellant resided at Crump's house, and the two slept together on Crump's bed. Crump regarded appellant as his

[13] Id.

boyfriend, and they had sex on multiple occasions. Crump testified that he considered their relationship to have been of a "sexual" nature as opposed to of a "romantic" nature. However, they did socialize together by frequenting bars where their friends and associates treated appellant as Crump's boyfriend."[14]

Again, this case illustrates the evidence required by Section 71.0021(b), (1), (2), and (3).

Garza v. Texas, No. 06-14-00088-CR (Court of Appeals Sixth District of Texas at Texarkana 2015) [15], was another assault case involving a dating relationship. Among the evidence presented at trial was that Defendant had asked the complainant out (on a date), that Defendant spent approximately three nights a week at complainant's house, that Defendant would "just come and go" to complainant's house, but that Defendant and complainant shared a bedroom and Defendant kept some of his clothes there, that complainant cooked and did washing for Defendant, and that Defendant and complainant discuss marriage.

In these cases, there was evidence presented to comply with the requirements of Section 71.0021(b). This Section requires more than

[14] *Ochoa v. State*, 355 S.W. 3 48 (Tex. App.-Houston [1 Dist.] 2010)
[15] *Garza v. Texas*, No. 06-14-00088-CR (Court of Appeals Sixth District of Texas at Texarkana 2015)

conclusory statements of a relationship. It requires there be particularized evidence of the three factors presented to the jury for their consideration in their resolution of the possible relationship of parties.

The Court, in *Britain v. State,* cited *Jackson* stating "To determine if evidence is legally sufficient, a court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. " Under this standard, evidence may be legally insufficient when the record contains either no evidence of an essential element, merely a modicum of one element, or it conclusively establishes reasonable doubt." [16]

The legal sufficiency required of evidence of a dating relationship is dictated by the three requirements of Section 71.0021(b), (1), (2), (3).

In Appellee's case, however, no evidence was presented by the State that would have allowed a rational trier of facts to meet the requirements of Section 71.0021(b), (1), (2), or (3) that there had been a dating relationship between Appellee and Ms. Bolden.

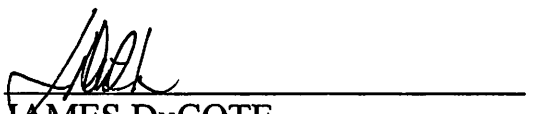
[16] *Britain v. State,* 412 S.W.3 518, 520 (Ct. Crim. App 2013)

The plurality opinion of the Fourteenth Court of Appeals is correct, and their decision should be upheld. Section 71.0021(b) requires more than the mention of the term "boyfriend" to establish a dating relationship. In the absence of the requirements of Section 71.0021(b) the evidence of the mention of the term "boyfriend" might be sufficient, but Section 71.0021(b) requires more. It requires particularized evidence of each of its three elements for the jury to consider. Otherwise, this statute would be rendered a nullity.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee prays that this Court deny the State's Petition for Discretionary Review, affirm the judgment of the Court of Appeals, and reverse Appellee's conviction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 25, 2020, a true and correct copy of foregoing *Appellee's Brief* was sent via facsimile transmission to Jack Roady, Galveston County District Attorney.

JAMES DuCOTE

CERTIFICATE OF COMPLIANCE

I certify that this *Appellee's Brief* is computer generated, and the word count is 2756.

JAMES DuCOTE